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U.S. DISTRICT COURT, E.D.N.Y.

★ SEP 23 2005 ★

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

BROOKLYN OFFICE

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|--|---|--------------------------------------|
| <b>BARBARA SCHWAB et al., individually and<br/>on behalf of all others similarly situated,</b> | ) | <b>Civil Action No. CV 04-1945</b>   |
|  | ) |                                      |
| <b>Plaintiffs,</b>   | ) | <b>MEMORANDUM AND ORDER</b>          |
|  | ) | <b>ON MOTION TO EXCLUDE EXPERT</b>   |
| <b>v.</b>  | ) | <b>TESTIMONY OF DR. ROBBIN DERRY</b> |
|  | ) |                                      |
| <b>PHILIP MORRIS USA, INC. et al.,</b>   | ) |                                      |
|  | ) |                                      |
| <b>Defendants.</b>   | ) |                                      |
|  | ) |                                      |

JACK B. WEINSTEIN, Senior District Judge:

This is a putative class action based on a charge of fraud by cigarette manufacturers leading to economic damages suffered by smokers who purchased "light" cigarettes. Defendants move to exclude the testimony and report of plaintiffs' expert Dr. Robbin Derry.

Plaintiffs have proffered Dr. Robbin Derry, a Research Professor at the Kellogg School of Management at Northwestern University, to render her expert opinion on the ethical nature of the defendants' conduct in developing and marketing "light" cigarettes. Dr. Derry is a well-qualified expert on business ethics.

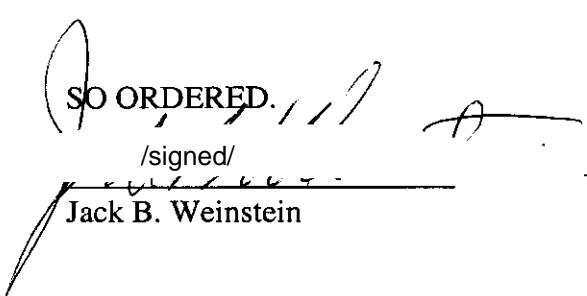
The issues in the litigation involve rules of substantive and procedural law that are only indirectly informed by ethical considerations. Dr. Derry's opinions may be useful to those formulating rules of law. They will not be relevant to the triers' consideration of the evidence relevant to findings of fact required by the rules of law.

Irrelevant evidence is inadmissible. *See Rule 402, Fed. R. Evid.* Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Since the ethical rules relied upon by Dr. Derry are not relevant, and therefore not admissible, the motion to exclude is granted on the ground of lack of relevancy.

The testimony of Dr. Derry should also be excluded because it might mislead the jury by confusing it about the differences between rules of law and their own ethical judgments. *See* Rule 403, Fed. R. Evid.

The motion to exclude Dr. Derry's opinion and testimony is granted.

  
SO ORDERED,

/signed/

Jack B. Weinstein

Dated: September 22, 2005  
Brooklyn, New York